IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE EARTH, et al. Plaintiff, vs. DEBRA A. HAALAND, et al. Defendants, and STATE OF LOUISIANA, et al. Defendant-Intervenors.	No. 1:21-cv-02317-RC Judge Rudolph Contreras **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

On January 27, 2021, President Biden issued an Executive Order directing federal agencies to take action to address climate change, including instructing the Department of the Interior to undertake a comprehensive review of federal oil and natural gas leases. While that review was underway, the Order directed Interior to pause new leases to the extent consistent with applicable law, such as the lease sale challenged here, known as Lease Sale 257, which had previously been scheduled to move forward. Several States sued to challenge the President's action, and in June, the District Court for the Western District of Louisiana issued an order enjoining Interior from pausing lease sales—including Lease Sale 257, specifically—because of the Executive Order. In light of the Louisiana court's injunction, Interior announced that the Bureau of Ocean Energy Management ("BOEM") intended to issue a record of decision to move forward with Lease Sale 257, which it did a few days later.

BOEM's record of decision for Lease Sale 257 complied with the National Environmental Policy Act ("NEPA"), and Plaintiffs' two claims to the contrary do not withstand scrutiny. First, Plaintiffs argue that the agency's analysis of greenhouse gas ("GHG") emissions was inadequate because the agency failed to account for the potential reduction in foreign consumption of oil and gas in the event Lease Sale 257 did not go forward. In order to get to this alleged flaw, however, Plaintiffs mistakenly bypass the analysis that BOEM conducted to evaluate the potential impacts of the lease sale on GHG emissions and climate change. The agency conducted an analysis of GHG emissions, including emissions from exploration and development activities, as well as the emissions associated with consuming the oil and gas. In the last part of the analysis, BOEM analyzed the degree to which future market trends and associated GHG emissions might be impacted by a decision to forego Lease Sale 257. BOEM

had sufficient data to conduct a quantitative analysis predicting a reduction in domestic demand and consumption, but it lacked—and could not reasonably obtain—adequate data to run a quantitative analysis of foreign consumption at the time. Plaintiffs' challenge on this basis should be rejected because BOEM reasonably explained the limitations in its methodology and conclusions. Moreover, BOEM's NEPA analysis of GHG emissions should be upheld because BOEM took a hard look at Lease Sale 257's full life cycle emissions in an analysis that Plaintiffs do not challenge.

Second, Plaintiffs advance a number of arguments as to why a supplemental NEPA analysis was necessary. In particular, Plaintiffs argued that supplementation was needed to address new information about climate change, impacts of drilling in deep water, and impacts to marine mammals. To be sure, new studies and reports have been issued since BOEM prepared its last supplemental NEPA analysis in 2018. The mere existence of new information, however, does not require the preparation of a supplemental analysis. Instead, it is the Plaintiffs' burden to demonstrate that there is *significant* new information regarding the nature of the proposed action or its impacts necessitating a supplemental analysis. They have failed to do so, and therefore, their claim should be rejected.

BACKGROUND

I. Legal Background

A. Outer Continental Shelf Land Act

The Outer Continental Shelf Lands Act ("OCSLA") of 1953, 43 U.S.C. §§ 1301-1356, was enacted to establish a regime for offshore oil and gas leasing. It was later amended in 1978 to further, among other policies, a national policy of making the Outer Continental Shelf "available for expeditious and orderly development, subject to environmental safeguards, in a

manner which is consistent with the maintenance of competition and other national needs." 43 U.S.C. § 1332(3). OCSLA prescribes a multi-stage process for development of offshore oil and gas resources, with environmental review at each stage. *Secretary of the Interior v. California*, 464 U.S. 312, 337-40 (1984). "[T]he leasing program's four-stage process is pyramidic in structure, proceeding from broad-based planning to an increasingly narrow focus as actual development grows more imminent." *Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466, 472-73 (D.C. Cir. 2009) (quoting *California v. Watt*, 668 F.2d 1290, 1297 (D.C. Cir. 1981) (internal quotation marks omitted).

The first stage is the "five-year program," involving the development and publication of schedules of proposed Outer Continental Shelf ("OCS") oil and gas lease sales over a five-year period to best meet the nation's energy needs. *See* 43 U.S.C. § 1344. The second stage, at issue in this case, is the lease sale itself. *See generally* 43 U.S.C. §§ 1334, 1337. The decisions made at this stage include whether and when to hold a sale, which lease blocks to offer in the sale, and the terms of the sale. 43 U.S.C. § 1337(a). The sale itself is accomplished through a competitive sealed-bid auction. 43 U.S.C. § 1337(a)(1). The qualified bidders submitting the highest bids obtain leases, which entitle them to conduct limited preliminary activities, *i.e.*, ancillary activities, such as lower-impact geophysical surveys. *See* 30 C.F.R. § 550.207. The third stage includes the lessee's filing and BOEM's review of an exploration plan pursuant to 43 U.S.C. § 1340(c) to explore for oil and gas deposits. The fourth and final stage, which is contingent upon discovery of paying quantities of oil or gas, is the lessee's filing and BOEM's review of a development and production plan for the purposes of producing oil and gas from the leaseholds. 43 U.S.C. § 1351; *see also Ctr. for Biological Diversity*, 563 F.3d at 473.

B. National Environmental Policy Act

The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370f ("NEPA"), serves the dual purposes of, first, informing agency decision-makers of the environmental effects of proposed major federal actions and, second, ensuring that relevant information is made available to the public. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). To meet these dual purposes, NEPA requires an agency to prepare an Environmental Impact Statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). While this mandate identifies the procedures agencies must follow to consider the environmental impacts of their actions, it does not dictate substantive results. *See Robertson*, 490 U.S. at 350. The Council on Environmental Quality ("CEQ") regulations implementing NEPA provide guidance as to the nature and content of an EIS. *See* 40 C.F.R. pt. 1502.[1]

In carrying out its NEPA and OCSLA duties, BOEM typically prepares a programmatic NEPA analysis for the five-year program and then prepares additional NEPA analysis at each OCSLA stage requiring federal action, including prior to lease sales. *See Ctr. for Biological Diversity*, 563 F.3d at 473; *see also N. Slope Borough v. Andrus*, 642 F.2d 589, 593-94 (D.C. Cir. 1980). Typically in the Gulf of Mexico Region, BOEM prepares an EIS analyzing a representative lease sale that can be used to support decisions for each of the Gulf of Mexico

[1] CEQ promulgated regulations implementing NEPA in 1978, 43 Fed. Reg. 55,978 (Nov. 29, 1978), and a minor substantive amendment to those regulations in 1986, 51 Fed. Reg. 15,618 (Apr. 25, 1986). In 2020, CEQ published a final rule substantially revising the 1978 regulations. 85 Fed. Reg. 43,304 (July 16, 2020). The claims in this case, however, arise under the 1978 regulations, as amended in 1986. *See* 40 C.F.R. § 1506.13 (2020) (specifying that the 2020 regulations apply only to NEPA processes begun after September 14, 2020). Unless otherwise noted, all citations to CEQ's regulations in this brief refer to those regulations as codified at 40 C.F.R. Parts 1500-08 (2019).

sales proposed in the five-year program (referred to as a multisale EIS). At the completion of that EIS, BOEM decides on the first sale covered in the document, and then conducts additional NEPA analyses, as necessary, for later lease sales.

II. Factual Background

A. Lease Sale 257

Lease Sale 257 is the eighth in a series of offshore oil and gas lease sales proposed by BOEM as part of the 2017-2022 Five-Year Outer Continental Shelf Leasing Program (the "2017-2022 Five-Year Program"). AR0029788. In Lease Sale 257, BOEM will offer for sale parcels across the Gulf of Mexico Region, with the exception of certain blocks, as indicated in the August 31, 2021 Record of Decision ("ROD"). AR0029789-90. Approximately 80 million acres will be available for lease. AR0029790. BOEM estimates that, as a result of the lease sale, between 0.211 to 1.118 billion barrels of oil and 0.547 to 4.424 trillion cubic feet of natural gas will be produced. AR0029790. The sale is scheduled to take place on November 17, 2021. *See* Gulf of Mexico Outer Continental Shelf Lease Sale 257 Final Notice of Sale, 86 Fed. Reg. 54,728 (Oct. 4, 2021).

B. NEPA Process for Lease Sale 257

Planning for Lease Sale 257 began over six years ago, when the Department of the Interior started developing the 2017-2022 Five-Year Program, as required by § 18 of OCSLA. In compliance with NEPA, BOEM published three EISs related to Lease Sale 257, each one tiering to and updating its predecessor. AR0029788. Those documents are:

(1) The Outer Continental Shelf Oil and Gas Leasing Program: 2017-2022 Final Programmatic EIS (the "Programmatic EIS"), AR0014242-15179;

(2) The Gulf of Mexico OCS Oil and Gas Lease Sales: 2017-2022 Gulf of Mexico Lease Sales 249, 250, 251, 252, 253, 254, 256, 257, 259, and 261 Final Multisale EIS (the "Multisale EIS"), AR0008116-9973; and

(3) The Gulf of Mexico OCS Lease Sale Final Supplemental Environmental Impact Statement 2018 (the "2018 Supplemental EIS"), AR0015471-16365.

In the Multisale EIS, BOEM prepared for the ten region-wide lease sales tentatively scheduled for the Gulf of Mexico by analyzing the potential impact of the decision to hold a single lease sale that would be representative of each subsequent planned sale. AR0008194. The Multisale EIS also stated that BOEM would conduct further NEPA reviews for later sales, as necessary. AR0008202 ("An additional NEPA review (e.g., a Determination of NEPA Adequacy, an [Environmental Assessment] or, if necessary, a Supplemental EIS) will be conducted prior to the decision on an individual proposed [Gulf of Mexico] lease sale to address any relevant new information."). Subsequently, BOEM completed the 2018 Supplemental EIS to update information in the Multisale EIS and to inform its individual decisions on Lease Sales 250 and 251.[2] AR0015475. Prior to the authorization of Lease Sale 257, BOEM reviewed the prior NEPA analyses for the 2017-2022 Gulf of Mexico sales and concluded in a Determination of NEPA Adequacy ("DNA"), dated September 11, 2020, that the prior analyses provided adequate NEPA coverage for its proposed lease sale. AR0029969-72. It therefore determined that supplementation of the EISs was not required prior to proceeding with a decision on Lease

[2] BOEM issued a notice of intent to prepare an additional supplemental EIS, but it rescinded that notice on January 15, 2020 after finding that there were not substantial changes in the proposed action and no new circumstances or information that triggered the need to prepare a supplemental EIS. 85 Fed. Reg. 2,437 (Jan. 15, 2020).

Sale 257 because there was no significant new information that could change the conclusions in the existing EISs. AR0029971-72.

On November 18, 2020, BOEM published a proposed notice of sale for Lease Sale 257. 85 Fed. Reg. 73,508 (Nov. 18, 2020). The proposed notice contained information on the proposed size, timing, and location of the sale, including lease stipulations, terms and conditions, minimum bids, royalty rates, and rental rates. *Id.* Governors of affected states were invited to provide comments on the size, timing, and location of the sale within sixty days of the notice. *Id.* In January 2021, BOEM prepared an Addendum to the September 2020 DNA addressing the agency's analysis of GHG emissions. AR0029962-68. On January 20, 2021, BOEM published a notice of availability of a record of decision for the sale. 86 Fed. Reg. 6,365 (Jan. 20, 2021).

Following the change in administration, President Biden issued Executive Order 14,008, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7,619 (Jan. 27, 2021). Section 208 of Executive Order 14,008 instructed the Secretary of the Interior, "[t]o the extent consistent with applicable law . . . [to] pause new oil and natural gas leases on public lands or in offshore waters pending completion of a comprehensive review and reconsideration of Federal oil and gas permitting and leasing practices," in accordance with the Secretary's broad authority over the stewardship of federal public land and offshore waters. *Id.* at 7,624. In light of the direction in Executive Order 14,008, BOEM published a notice withdrawing that record of decision for Lease Sale 257 in February 2021. 86 Fed. Reg. 10,132 (Feb. 18, 2021). Subsequently, Louisiana and other States brought suit in the Western District of Louisiana challenging the U.S. Department of the Interior over its actions relating to the executive order. In June, the court in that case issued an order enjoining Interior Department officials from implementing the leasing pause described in Section 208 of Executive Order 14,008. *See Louisiana v. Biden*, No. 2:21-cv-

778, 2021 WL 2446010, at *22 (W.D. La. June 15, 2021). The Court specifically stated that Lease Sale 257 had been, in its view, unlawfully rescinded. *See id.* at *18-20.

In July and August, the Plaintiffs in this case sent letters to officials within the U.S. Department of the Interior and BOEM requesting that the agency prepare a supplemental EIS for Lease Sale 257. *See* Pls.' Exs. 4 & 5, ECF Nos. 34-13, 34-14. BOEM had previously indicated that information regarding the status of the environmental review could be obtained by contacting the agency, and it provided contact information for the Chief of the Environmental Assessment Section within the agency. *See* 86 Fed. Reg. 10,132. Notably, when Plaintiffs later submitted letters to the Department of the Interior regarding Lease Sale 257, they did not send the information to the Chief of the Environmental Assessment Section and instead sent it to various other officials. *See* Pls.' Exs. 4 & 5.

In light of the Louisiana court's injunction, Interior moved forward with Lease Sale 257 while it appealed the District Court's order. *See* https://www.doi.gov/pressreleases/interior-department-files-court-brief-outlining-next-steps-leasing-program (last visited Nov. 10, 2021). BOEM reviewed the information in the existing EISs and determined in another DNA,[3] finalized on August 27, 2021, that the prior NEPA analyses were sufficient and there was no need to prepare any supplemental NEPA analysis. AR0029801-942. On August 31, 2021, BOEM issued a record of decision ("ROD") for Lease Sale 257, AR0029788-800, and the notice of the ROD was published in the Federal Register on September 7, 2021. 86 Fed. Reg. 50,160 (Sept. 7, 2021). On October 4, 2021, BOEM published a final notice of sale announcing that the sale would take place on November 17, 2021. 86 Fed. Reg. at 54,728.

[3] Unless otherwise noted, subsequent references to "DNA" refer to the August 2021 DNA.

STANDARD OF REVIEW

Judicial review of agency action taken under NEPA is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 872 (1990); *Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1295 (D.C. Cir. 2007) (citation omitted). The reviewing court may set aside agency action only if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard is "narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). The Court must uphold an agency's decision if it finds "adequate support in the record." *J.A. Jones Mgmt. Servs. v. FAA*, 225 F.3d 761, 765 (D.C. Cir. 2000); *see also El Conejo Americano of Tex., Inc. v. DOT*, 278 F.3d 17, 20 (D.C. Cir. 2002).

In applying this standard of review to NEPA cases, the "role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97-98 (1983). Courts review compliance with NEPA under a "rule of reason." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989). A court should "ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Sierra Club v. Federal Energy Regulatory Comm'n*, 867 F.3d 1357, 1367 (D.C. Cir. 2017) (citation omitted). A court "should not flyspeck an agency's environmental analysis, looking for any deficiency no matter how minor." *Id.* at 1368 (citation and internal quotation marks omitted).

ARGUMENT

I. BOEM'S Analysis of Greenhouse Gas Emissions Complied With NEPA

BOEM's analysis of GHG emissions resulting from Lease Sale 257 complied with NEPA. The multiple EISs and supporting documents indicate that BOEM took this issue seriously and took the appropriate hard look at potential impacts of this lease sale on GHG emissions and climate change. Plaintiffs argue that the modeling that BOEM relied on for its GHG emissions analysis was flawed, but they criticize only one aspect of the analysis. Specifically, they argue that BOEM did not quantify the impact on foreign GHG emissions based on an anticipated reduction in foreign demand for oil and gas, based on misplaced reliance on a Ninth Circuit opinion, *Center for Biological Diversity v. Bernhardt* ("*Liberty*"), 982 F.3d 723, 731-32 (9th Cir. 2020). BOEM did qualitatively analyze such impacts, which informed its leasing decision. But BOEM was not required by NEPA to quantitatively analyze this effect because it did not have adequate data to do so, and it explained the missing data and why it could not be obtained in a timely manner, in accordance with 40 C.F.R. § 1502.22 (providing that in analyzing the reasonably foreseeable impacts of its proposed action, an agency should disclose incomplete or unavailable information). D.C. Circuit precedent does not require such a quantitative analysis in these circumstances. And even if the court is persuaded by the Ninth Circuit's reasoning in the *Liberty* case, BOEM has met the Ninth Circuit's requirement to explain why a quantitative analysis of the impacts on foreign consumption was not feasible at the time for Lease Sale 257.

A. BOEM Took a Hard Look at the Impacts of the Lease Sale on Climate Change and Greenhouse Gas Emissions

In the Programmatic EIS, BOEM analyzed the potential impacts on GHG emissions associated with its leasing program. AR0014377-83. To support its analysis, BOEM prepared a

detailed report analyzing the lifecycle GHG emissions: OCS Oil and Natural Gas Emissions and Social Cost of Carbon (November 2016) (the "Wolvovsky and Anderson Report" or "Report"). AR0014186-241. The Report analyzed both upstream and downstream greenhouse gas ("GHG") emissions as part of this lifecycle emissions analysis. AR0014191. BOEM relied on the analyses in the Programmatic EIS and Report in making its decision regarding Lease Sale 257.

The stated goal of the Report was to analyze lifecycle GHG emissions associated with offshore oil and gas leasing and development and to estimate the potential societal costs of those emissions. AR0014198. In drafting the Report, BOEM was guided by CEQ's guidance regarding analysis of GHG emissions and the impacts of climate change. *Id.*; *see also* 81 Fed. Reg. 51866-67 (Aug. 5, 2016).[4] The Report contained a general discussion of climate change and the United States' GHG emissions. AR0014199-202. The Report then explained its methodology for evaluating GHG emissions, a small piece of which is at issue in this case. That methodology is divided into four parts: (1) emissions from exploration, development, production, and transport of oil and gas to shore; (2) emissions from the processing, storage, and distribution of oil and gas; (3) emissions from the consumption of oil and gas; and (4) emissions from energy substitutes. AR0014202-09.

[4] CEQ withdrew the GHG Guidance on April 5, 2017, pursuant to Executive Order No. 13,783, entitled "Promoting Energy Independence and Economic Growth." But that order was itself revoked on January 20, 2021, when President Joseph R. Biden issued Executive Order No. 13,990, entitled "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." Section 7 of EO 13,990 directs CEQ to "review, revise, and update" the GHG Guidance "as appropriate and consistent with applicable law." Consistent with that directive, on February 19, 2021, CEQ published a Federal Register Notice explaining that federal agencies "should consider all available tools and resources in assessing GHG emissions and climate change effects of their proposed actions, including, as appropriate and relevant, the 2016 GHG Guidance." 86 Fed. Reg. 10,252 (February 19, 2021).

Notably, Plaintiffs take no issue with the first three parts of BOEM's analysis, nor could they. Those portions of BOEM's analysis comply with the standards articulated in this Court's decision in *Wildearth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019). There, this Court held that NEPA analysis for onshore oil and gas lease sales should include a full quantification of the lifecycle GHG emissions associated with the leases, and that agencies must use the information available to them to forecast reasonably foreseeable downstream emissions or explain why such an analysis is not feasible. *Id*. at 67-75. Consistent with this Court's guidance, BOEM has analyzed the lifecycle GHG emissions associated with its offshore leasing program. AR14200-07; AR0014378-83.

More specifically, BOEM analyzed emissions from all operations on the OCS, including the potential for oil spills, under expected exploration and development scenarios. AR0014203. Next, BOEM analyzed the GHG emissions associated with the onshore processing of the oil produced and delivery of the oil to consumers. AR0014203-04. And in the third step, BOEM analyzed the ultimate consumption of oil and gas products, such as gasoline, jet fuel, and other petroleum products. AR0014204-07. In the Programmatic EIS, which relied on the Report, BOEM explained that its analysis of GHG emissions was a lifecycle analysis, including both the upstream emissions associated with offshore exploration, development, and production, and downstream emissions associated with oil and gas consumption. AR0014378-83. This analysis complies with the Court's direction in the *Wildearth Guardians*, 368 F. Supp. 3d at 67-75.

Plaintiffs take issue only with the fourth part of BOEM's methodology, where BOEM forecasted emissions associated for potential energy substitutes. This part of the analysis is not related to the actual consumption of the oil and gas produced from the OCS, which is addressed in the third part of the analysis. AR0014204-07. Instead, in this part of the analysis, BOEM

evaluated the difference between the GHG emissions that would occur from the five-year oil and gas leasing program as compared to the no action alternative (no leasing during that period) given the potential effect on the use of other energy sources. AR0014207. To do this, BOEM used information from the Energy Information Administration ("EIA") to estimate energy sources that would be available if oil and gas leases on the OCS were not issued during this period. *Id.* Those other sources of energy include onshore oil and gas production, oil imports, coal, biofuels, nuclear, and renewable energy. *Id.* To compare the GHG emissions, BOEM estimated the lifecycle GHG emissions from these other sources of energy. *Id.*

BOEM analyzed changes in energy consumption using its Market Simulation ("MarketSim") model. AR0014208. The model simulates the consumption of oil, natural gas, coal, and electricity across four sectors of the economy: residential, commercial, industrial and transportation. *Id.* The model is based primarily on U.S. energy markets, but it incorporates interaction with world markets as appropriate. *Id.* The emissions resulting from the substitution of other sources of energy are estimated using a sophisticated mathematical formula set out in the Report. AR0014208-09. The model assumes that GHG emissions will be negligible when certain sources of energy—nuclear, biofuels, solar, and wind—are substituted for oil and gas sourced from the Outer Continental Shelf, and it assumes that GHG emissions will be higher vis-à-vis that same oil and gas where coal is used as a substitute energy source. AR0014208.

To estimate emissions that may result from the five-year leasing program, BOEM estimated oil and gas production from leases that may be issued following the lease sales scheduled over the course of the 2017-2022 Five-Year Program. AR0014211-16. Using MarketSim, BOEM also estimated the production of energy that would be substituted for offshore oil and gas if the leasing program did not go forward. AR0014214. The model assumes

that, in the absence of a leasing program, demand for energy will be reduced through reduced energy consumption. AR0014214. The Report also uses several other key assumptions, most of which are not relevant here. AR 0013217-20. Plaintiffs take issue only with the tenth assumption, which is that foreign consumption would remain constant—an assumption BOEM explained was necessary due to a lack of information sufficient to reliably forecast foreign consumption trends. AR0014220. BOEM modeled the anticipated drop in demand for oil and gas that would occur within the United States if the offshore leasing program were not implemented, AR0014214-15, but it did not—and could not—conduct the same analysis for foreign consumption. AR0014220.

Based on the MarketSim model, the Wolvovsky and Anderson Report estimated that under the no action alternative foreign consumption of oil would be reduced by 1 billion to 6 billion barrels of oil, depending upon the price of oil. *Id.* But the Report explained that it was not feasible to incorporate the reduction in foreign demand into the quantitative analysis of GHG emissions due to the highly uncertain nature of predicting how leasing decisions within the United States would affect oil and gas production in other countries. *Id.* Further, oil consumption varies by country, and BOEM did not have adequate information to determine which countries would consume less oil. *Id.* In addition, BOEM did not have any information about how changes in the natural gas market would affect consumption in other countries. *Id.*

After laying out the methodology and key assumptions, the Report then sets forth estimates for GHG emissions for the leasing program compared to not going forward with the leasing program based on low, mid, and high prices scenarios. AR0014220-24. In each of those scenarios, the GHG emissions associated with leasing were slightly lower than the emission associated with the no action alternative. *Id.* Under the high price scenario, for example, GHG

emissions associated with leasing in all offshore areas were estimated to be 7,886,680 thousand metric tons, as compared to 8,020,550 thousand metric tons for the no action alternative. AR0014221. The figures for the Gulf of Mexico were 3,801,480 and 3,719,880, respectively. *Id.*

This analysis was carried forward into the Programmatic EIS. After analyzing the GHG emissions associated with particular offshore oil and gas activities, such as vessel use, drilling, and other activities that consume fossil fuels, the EIS analyzed the lifecycle GHG emissions associated with leases that may be issued under the five-year leasing program based on the figures produced in the Wolvovsky and Anderson Report. AR0014378-83. The EIS explained that the estimates provided were based on the methodology and assumptions set forth in the Report. *Id.* Specifically, it disclosed that the analysis was limited to U.S. consumption and that a likely reduction in foreign consumption was not accounted for in the analysis. *Id.* The same analysis was adopted in the Multisale EIS, AR0008543-46, and the 2018 Supplemental EIS, AR0015627, supporting BOEM's decisions regarding individual lease sales. These analyses helped inform BOEM's decisions on individual lease sales, including Lease Sale 257.

Finally, in January 2021, BOEM prepared the Lease Sale 257 DNA Addendum to assess the adequacy of its underlying NEPA analysis following the Ninth Circuit's decision in *Liberty*, 982 F.3d 723, and concluded that its analysis remains adequate.[5] In that case, the court ruled that BOEM should have either quantified the reduction in foreign emissions associated with not approving the project at issue or "explained more specifically why it could not have done so." *Id.* at 740 (citation omitted). In the DNA Addendum, BOEM provided additional reasons why a

[5] The *Liberty* case and a District of Alaska case following it, *Sovereign Inupiat for a Living Arctic v. U.S. Bureau of Land Mgmt. ("Willow")*, Nos. 3:20-cv-00290, 3:20-cv-00308-SLG, 2021 WL 3667986, at *10-14 (D. Alaska Aug. 18, 2021), are discussed in section I.C., *infra*.

quantitative analysis of the reduction in foreign emissions was not feasible at that time. AR0029962-68. BOEM explained the Ninth Circuit's finding and acknowledged that the agency used a similar approach for analyzing the lifecycle GHG emissions for the offshore leasing program as it did for the Liberty Project, AR0029963-64, *i.e.*, a model focused on the domestic energy markets due to a lack of available information regarding foreign consumption. AR0029964. BOEM explained, however, that it did consider the potential decrease in foreign consumption qualitatively in its analysis. *Id.* Specifically, the reduction in foreign consumption was taken into account "by broadly considering the magnitude of market shifts caused by the Proposed Action and No Action alternative, and describing the potential translation of those shifts to changes in emissions." *Id.*

The DNA Addendum explained that BOEM could not quantitatively analyze foreign consumption trends and emissions resulting from the cancellation of offshore lease sales without first estimating GHG emissions in countries all over the world. AR002965. And it explained that BOEM did not have sufficient information regarding potential alternative sources of energy in those various other countries to conduct such an analysis with sufficient rigor. *Id.* For domestic markets, BOEM uses detailed information compiled by the EIA, which includes information on alternative sources of oil and gas and alternative energy sources. *Id.* In order to estimate the energy sources that would be used to provide alternative sources of energy in other countries, BOEM would have needed to obtain comparable information about the potential energy mix in each country across each segment of the economy. AR0029965-66. Thus, for example, BOEM would have needed to know for each relevant country whether it was likely to substitute sources of energy with lower GHG emissions, such as renewable energy, or sources of energy with higher GHG emissions, such as coal. *Id.* With the exception of data relating to

foreign demand for crude oil and the effects on demand for U.S. crude oil and refined products, BOEM did not have the data necessary to conduct such an analysis and could not reasonably obtain it. *Id.* For all of these reasons, the DNA Addendum explains that BOEM instead provided a qualitative analysis of the change in GHG emissions caused by a potential decrease in foreign consumption. AR0029966-67.

The DNA Addendum also explained why BOEM's analyses and conclusions were reliable, even without the modeling of foreign consumption. Specifically, it determined that the planned Gulf of Mexico lease sales for the entire 2017-2022 Five-Year Program (i.e., all ten associated lease sales, not one lease sale) would increase global consumption of oil by approximately 3.9 billion barrels—only 0.15% of the 2.8 trillion barrels of oil that the model estimated would be consumed globally over the same time period. AR0029965. And it recognized that the change in global consumption caused by just one lease sale, such as Lease Sale 257, would be a much smaller increase. *Id.* On that basis, BOEM reasonably concluded that a quantitative analysis of foreign consumption trends would not meaningfully change BOEM's analysis with respect to Lease Sale 257, including the conclusions it reached based on its qualitative analysis of the potential decrease in foreign consumption. AR0029966.[6]

[6] On October 22, 2021, BOEM published a draft EIS for Lease Sale 258, which is proposed to be held for the Cook Inlet Planning Area in Alaska. *See* https://www.boem.gov/oil-gas-energy/leasing/lease-sale-258 (last visited Nov. 9, 2021). For Cook Inlet Sale 258, BOEM is undertaking a quantitative analysis of impacts on foreign oil consumption and the resulting GHG emissions under the no action alternative using a generic emissions factor. Normally, rather than using a single emissions factor, a range of emissions factors would be used that corresponds to the different end uses of petroleum products after oil refining. However, BOEM has applied a single emissions factor to all combusted oil, due to a continuing lack of information about the end petroleum products consumed in foreign markets. During the public review period for the Lease Sale 258 Draft EIS, BOEM is seeking comments on this process and the use of a generic factor to approximate consumption shifts, and whether the process can or should be refined. This new analysis was not reasonably available during the timeline for the Lease Sale 257 decision.

In sum, BOEM explained that information regarding foreign energy markets was unavailable at the time of its decision, and it concluded that a quantitative analysis of the emissions associated with a reduction in foreign consumption was not feasible because of those data gaps, all in accordance with CEQ's NEPA regulations, 40 C.F.R. § 1502.22. *See Oceana v. Bureau of Ocean Energy Mgmt.*, 37 F. Supp. 3d 147, 154-61 (D.D.C. 2014) (rejecting a NEPA challenge to a lease sale based on alleged lack of information because BOEM had disclosed the information that was not available at the time of its decision and evaluated potential impacts based on scientifically accepted methods). Further, BOEM explained that the anticipated reduction in foreign consumption was already considered qualitatively in its analysis, and it fully disclosed the results of that analysis. AR29967.

Taken together, this analysis took a hard look at foreseeable GHG emissions in compliance with NEPA, including with respect to upstream emissions, direct emissions, downstream emissions, and market substitutes. With respect to the last category—the only one Plaintiffs challenge—BOEM modeled the effect of market trends and energy substitutes to the extent possible using the information available to it at the time, and it reasonably prepared a robust qualitative analysis for those aspects of its analysis where modeling was not yet available. As discussed further below, BOEM's analysis complied with D.C. Circuit precedent, including this Court's prior rulings, and responded to the direction in the Ninth Circuit's *Liberty* decision to provide further explanation as to why a quantitative analysis of the change in GHG emissions due to a reduction in foreign consumption was not feasible at the time of BOEM's decision.

B. BOEM's Analysis of Greenhouse Gas Emissions Is Consistent with the D.C. Circuit's *Sierra Club* Decisions

BOEM fully explained why it could not quantify the change in emissions that would result from the change in world demand for oil and gas if the offshore program were not

approved. *See* section I.A., *supra*. The Wolvovsky and Anderson Report, on which the analysis in the Programmatic EIS relies, explains that it was not feasible to incorporate the reduction in foreign demand into the GHG analysis because BOEM did not have information on which countries would reduce their consumption of oil and what sources of energy they would substitute for oil. AR0014220. BOEM provided a similar, more detailed analysis in the DNA Addendum. AR0029963-67. BOEM acknowledged that its MarketSim model estimated that global consumption of oil would increase by 3.9 billion barrels (representing a 0.15% increase in foreign consumption), for the anticipated production from the entire 2017-2022 Five-Year Program, of which Lease Sale 257 was a part, but it explained that it was not feasible to calculate how foregoing implementation of the 2017-2022 Five-Year Program would translate into a change in GHG emissions because it did not have information regarding substitute sources of energy in all of the countries that purchase oil and gas. AR29965-66.

Plaintiffs' criticisms of BOEM's analysis and conclusions cannot be reconciled with the D.C. Circuit's reasoning and holding in *Sierra Club v. U.S. Department of Energy* ("*Sierra Club I*"), 867 F.3d 189 (D.C. Cir. 2017) In that case, the Sierra Club challenged the Department of Energy's grant of an application to export liquefied natural gas ("LNG"). *Id.* at 192. One of the Sierra Club's arguments was that the agency should have analyzed the indirect effects of LNG exports on GHG emissions. *Id.* at 201. In that case, as here, the agency analyzed the lifecycle GHG emissions. *Id.* at 201-02. The Sierra Club, nevertheless, argued that the agency should have analyzed an additional variable—the potential for LNG exports to compete with renewable energy in foreign markets. *Id.* at 202. The government explained that, in order to do so, it would have had to analyze the energy markets in all of the countries receiving LNG exports and that

such an analysis was not feasible. The court concluded that there was "nothing arbitrary about the Department's decision." *Id.*

Similarly here, Plaintiffs argue that BOEM was required to analyze the potential impacts of Lease Sale 257 on the foreign consumption of oil and gas and consequent GHG emissions. Just as in *Sierra Club I*, conducting a quantitative analysis of the potential changes in GHG emissions resulting from changes in foreign consumption "would require projections of how each fuel source (nuclear, renewable, etc.) would be affected in each" country and "would require consideration of the dynamics of all energy markets" in each country affected by global oil and gas markets. *Id.* BOEM's decision that such an analysis was not feasible was reasonable and should be upheld.

Further, BOEM's decision was consistent with *Sierra Club v. Federal Energy Regulatory Commission* ("*Sierra Club II*"), 867 F.3d 1357 (D.C. Cir. 2017). Plaintiffs wrongly suggest that BOEM failed to disclose the assumptions in its model and the consequences of those assumptions. Mem. in Supp. of Pls.' Mot. for Summ. J. ("Pls.' Mem.") at 30, ECF No. 34-1 (citing *Sierra Club II*, 867 F.3d at 1374). To the contrary, BOEM fully disclosed the assumptions of the Wolvovsky and Anderson Report, including that the reduction in foreign consumption would not be included in GHG emissions analysis. AR0014217-20; AR0014381. Importantly, BOEM acknowledged and disclosed that, as a result, the GHG analysis did not account for a likely reduction in foreign demand for oil and gas. AR0014220; AR0014381. Plaintiffs' reliance on *Sierra Club II* for the proposition that an agency "must either quantify and consider the project's downstream carbon emissions or explain in more detail why it cannot do so," Pls.' Mem. at 30 (citing *Sierra Club II*, 867 F.3d at 1375), is likewise inapposite because BOEM *did* analyze all of the downstream GHG emissions resulting from its 2017-2022 Five-

Year Program, which includes Lease Sale 257, even if BOEM could not quantify all the indirect effects related to foreign energy use. AR0014378-83; AR0014200-09.

Plaintiffs' other arguments are equally unavailing. They suggest that BOEM "summarily assumed that foreign emissions would increase if the U.S. did not produce oil and that overall global emissions would be greater if [BOEM] did not hold the lease sale." Pls.' Mem. at 31. It is true that BOEM's analysis concluded that the emissions associated with BOEM's offshore program would be slightly lower than if the program were cancelled. AR0014381; AR0014221. But Plaintiffs are wrong that BOEM did not explain the reasons for this result. If the offshore program did not occur, the energy required to replace the loss of oil and gas would need to come from other sources. AR0014207. As the D.C. Circuit has observed, replacing offshore oil with other sources of energy "carries its own environmental risks and harms." *Ctr. for Sustainable Economy v. Jewell*, 779 F.3d 588, 603 (D.C. Cir. 2015).

The GHG emissions associated with the replacement domestic (but not foreign) sources of energy were calculated based on lifecycle emissions—just as the emissions from the oil and gas that would be produced by the offshore program were calculated. AR0014207. The model considered several alternative sources of energy, including oil and gas from other sources, such as coal, nuclear, biofuels, solar, and wind. AR0014208. BOEM concluded that coal would be used to replace some of the lost offshore energy resources and coal has higher GHG emissions than oil and gas. *Id.* In addition, replacement oil and gas are assumed to have higher upstream GHG emissions because oil production overseas and domestic onshore natural gas production are more GHG emission intensive than production on the OCS. AR 0014209. The higher emissions associated with foreign sources also are due to the transport of the oil in tankers. *Id.* Therefore,

Plaintiffs are simply incorrect that the discrepancy in GHG emissions between the proposed offshore program and the no action alternative is not explained in the record.

Finally, Plaintiffs are incorrect that evidence in the record shows that quantitative analysis of the reduction in foreign GHG emissions due to the estimate of foreign consumption could have been conducted. *See* Pls.' Mem. at 31. The MarketSim model estimated that the reduction in foreign consumption if the offshore program were cancelled would result in a 1, 4, and 6 billion barrel reduction in demand for oil in the low, mid, and high price scenarios. AR0014220. As explained in the Report, however, those figures cannot easily be converted into GHG emissions because of the difficulties in calculating the emissions of potential substitutes in all of the countries in the world consuming oil and gas. *Id.*; *see also* AR0029965-66.

Plaintiffs claim that the Stockholm Environmental Institute study ("Stockholm Study") shows that such an analysis was possible. Pls.' Mem. at 31. It does not. The study is entitled: "How would phasing out U.S. federal leases for fossil fuel extraction affect CO^2 emissions and 2°C goals?" AR0026911. It evaluated the potential impacts on GHG emissions if the United States were to cease issuing new onshore and offshore leases up through 2040. AR0026923-24. The study concluded that if the United States did so, emissions would be reduced by 31 million metric tons in 2030. AR0026938. But in order to reach that conclusion, the study made assumptions that did not meet the standards of the model that BOEM used for the analysis of GHG emissions in the Programmatic EIS and the Wolvovsky and Anderson Report.

The Stockholm study looked at potential changes in GHG emissions just from coal and oil. AR0029629. It did not evaluate changes in emissions resulting from changes in natural gas because the study concluded that changes in natural gas production would not have a significant impact on GHG emissions. AR0026929-30. It excluded important sources of GHG emissions

by leaving out entirely "emissions associated with extracting, processing, or transporting each resource." AR0026929 n.21. It also acknowledged that if leases start producing before the end of the lease term, thus extending the leases, then the study's estimates of the reduction in GHG emissions due to the non-renewal of leases could be "too high." AR0026929-30 n.22. The study estimated that for every unit decrease in oil production, consumption of oil would decrease by 0.44 units and the use of fuel oil substitutes, *i.e.*, biofuels, natural gas, and electricity, would increase by 0.22 units. AR0026936. According to the study, the alternative fuel mix would cause 85% of the emissions compared to oil. AR0026937. Yet the study acknowledged that "[t]he most widely used biofuel in the U.S., ethanol from corn, offers only modest (if any) [GHG] emission reductions relative to petroleum fuels" and that other biofuels that may be less GHG intensive are "still under development." AR0026937 n.37. The study also did not analyze substitutes for oil across other sectors of the economy, *i.e.*, residential, commercial, and industrial, as the BOEM study did. AR0014208.

In addition, the Stockholm study acknowledged several uncertainties in its analysis. With respect to the oil markets, it acknowledged that its analysis was "dependent on the responsiveness of other oil suppliers to lower U.S. federal supplies in global markets." AR0026940. In a higher-carbon world, meaning a world with fewer restrictions on GHG emissions, oil production would be less sensitive to a decline in U.S. production. AR0026941. In contrast, in a lower carbon-world, where countries around the world restrict GHG emissions, the impact of reducing production would be greater. *Id.* The study included a sensitivity analysis in Appendix B, which indicated that with respect to oil, depending on the assumptions made regarding efforts to restrict GHG emissions, the reductions in GHG emissions if the United States were to cease issuing new onshore and offshore leases up through 2030 could be as low as

4 million metric tons or as high as 64 million metric tons. AR0026949. This wide range of results is due to the fact that the Stockholm study made broad assumptions about how individual markets around the world would react to a reduced supply in U.S. oil production.

Given the Stockholm study made broad assumptions, such as the wide availability of less intensive biofuels for transportation, in order to quantify the reduction in foreign consumption and consequent change in GHG emissions, the study does not meaningfully undermine BOEM's conclusion that it lacked sufficient data to conduct such an analysis. AR0014220; AR0029965-66. The Court should defer to the agency's judgment because it is an area in which the agency has a high level of technical expertise. *See Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976) ("Resolving these issues requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies."); *see also Marsh v. Or. Natural Res. Council*, 490 U.S. 360 (1989). BOEM provided the assumptions on which its model relied, explained the reasons for those assumptions, and provided a qualitative analysis of the reduction in foreign emissions; NEPA requires nothing more. *See Sierra Club I*, 867 F.3d at 202 (agreeing with the government's argument that an analysis of foreign export markets was not necessary because it "would require consideration of the dynamics of all energy markets in LNG-importing nations"); *see also WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013) (upholding an analysis of GHG emissions where the agency disclosed the assumptions that underlay that analysis).[7]

[7] Plaintiffs rely on this Court's ruling in *WildEarth Guardians*, 368 F. Supp. 3d 41, to support their argument that an agency may not assert that an analysis would be speculative if there is evidence in the record that belies such assertion. *See* Pls.' Mem. at 30. In that case, the Court found that there was sufficient data in the record to allow BLM to at least conduct an analysis of upstream GHG emissions associated with its leasing decisions. *See WildEarth Guardians*, 368 F. Supp. 3d at 68-71. This principle does not support Plaintiffs' arguments here because, as

C. BOEM Has Provided the Explanation Required by the Ninth Circuit's Opinion in the *Liberty* Case

Plaintiffs' arguments rely heavily on the Ninth Circuit's decision in *Liberty*, 982 F.3d 723, and the District of Alaska's decision in *Willow*, 2021 WL 3667986. In 2019, conservation groups challenged BOEM's approval of an offshore drilling and production facility in the Beaufort Sea off Alaska, known as the Liberty Project. *See Liberty*, 982 F.3d 731-32. In the NEPA analysis supporting the decision to approve the Liberty Project, BOEM took a similar approach to analyzing lifecycle GHG emissions as it did for the five-year leasing program. AR0029964. Specifically, the modeling used to support the NEPA analysis similarly excluded a potential reduction in foreign oil consumption based on BOEM's actions. *Liberty*, 982 F.3d at 736-40. The court concluded that BOEM should have either quantified the reduction in foreign emissions associated with not approving the project or "explained more specifically why it could not have done so." *Id.* at 740 (quoting *Sierra Club II*, 867 F.3d at 1374).

The *Liberty* decision (unlike the D.C. Circuit's *Sierra Club* decisions) is not binding on this Court, but if the Court were to find its reasoning persuasive, BOEM has complied with the direction in that case to explain why it excluded the reduction in foreign consumption from its quantitative analysis of GHG emissions and instead considered the reduction qualitatively. As discussed above, *see* section I.A., *supra*, it did so in the Wolvovsky and Anderson Report, AR0014220, and the DNA Addendum, AR0029965-66. Plaintiffs assert that BOEM had sufficient information to conduct such an analysis, Pls.' Mem. at 33, but they ignore the fact that BOEM would have needed to obtain information on the markets for energy substitutes in countries around the world in order to conduct that analysis in a detailed manner, comparable to

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discussed above, BOEM has adequately explained why it could not have conducted a quantitative analysis of the change in GHG emissions associated with a reduction in foreign consumption of oil and gas at the time. AR0029964-67.

its analysis of the domestic energy markets using MarketSim. AR0029965-66. Plaintiffs are also incorrect that the reduction in foreign consumption was ignored. *See* Pls.' Mem. at 33-34. BOEM conducted a qualitative analysis of the reduction in foreign consumption and acknowledged the fact that such consumption would be reduced in the Programmatic EIS, AR0014381, and the DNA Addendum, AR0029965. Thus, unlike in *Liberty*, BOEM did not assume "that the impact of [its action] on foreign oil consumption [would] be negligible." *Liberty*, 982 F.3d at 740.

The *Willow* decision in the District of Alaska followed the *Liberty* decision. *See Willow*, 2021 WL 3667986, at *10-14. The court acknowledged that the agency had supplied some additional explanation. *See id.* at *12 (stating that BLM "provide[d] a lengthier explanation" than BOEM had in the *Liberty* case. The court, nevertheless, held that BLM's explanation was not sufficient in light of the controlling *Liberty* decision because the agency still had not "thoroughly explained" why such an analysis was not possible. *Id.* (internal quotation marks and brackets omitted). Here, *Liberty* does not control, and BOEM has prepared the DNA Addendum to explain why a quantitative analysis of the reduction in foreign consumption could not have been conducted. AR0029962-68. In contrast, in the *Willow* case, BLM provided its explanation only in responses to comments. *See* Willow Project Final EIS excerpt, Ex. 1.[8] Further, contrary to Plaintiffs' assertions, BOEM did not assume "that the No Action Alternative would increase GHG emissions." Pls. Mem. at 33. Rather than assuming, BOEM explained that the increase in GHG emissions was caused by the need to substitute for some of the decreased production with oil from foreign sources, which is more GHG intensive and requires transportation to the United

[8] Exhibit 1 contains the pages of the Willow Project Final EIS cited in *Willow*, 2021 WL 3667986, at *12 & n.126. The full EIS for the Willow Project is available at: https://eplanning.blm.gov/eplanning-ui/project/109410/570 (last visited Nov. 10, 2021).

States. AR 0014209. Some of the lost energy would also be replaced by coal, which is more GHG intensive than oil. AR0014208.

Plaintiffs argue that it was improper for BOEM to put its additional explanation as to why it could not quantify changes in foreign consumption in the DNA, as opposed to an EA or EIS. *See* Pls.' Mem. at 34. A DNA is, however, an appropriate mechanism for an agency to determine whether its existing analysis is sufficient and is expressly provided for in the Department of the Interior's regulations. 43 C.F.R. § 46.120(c). Under the regulations, an agency may rely on existing NEPA analysis if it documents its determination that the existing analysis "adequately assesses the environmental effects of proposed action and reasonable alternatives." *Id.* The agency should "include an evaluation of whether new circumstances, new information or changes in its impacts not previously analyzed may result in significantly different environmental effects." *Id.* That is precisely what BOEM did here. Plaintiffs' reliance on *Great Basin Resource Watch v. Bureau of Land Management*, 844 F.3d 1095, 1104 (D.C. Cir. 2016), is misplaced. *See* Pls.' Mem. at 34. Unlike in *Great Basin*, where the agency was attempting to use an addendum to provide additional NEPA analysis, here BOEM was simply explaining why additional NEPA analysis was not necessary, consistent with the applicable regulation. The DNA Addendum was suitable for this purpose. *See Friends of Animals v. U.S. Bureau of Land Mgmt.*, 232 F. Supp. 3d 53, 63 (D.D.C. 2017) (upholding the agency's reliance on a DNA which found that the action "would not result in 'significantly different environmental effects'") (quoting 43 C.F.R. § 46.120).

In sum, BOEM conducted a sufficient analysis of the GHG emissions associated with its 2017-2022 Five-Year Program, including all of the lease sales that are part of that program and specifically Lease Sale 257. It analyzed the lifecycle GHG emissions associated with the leasing

program and the lifecycle GHG emissions associated with domestic energy substitutes under the no action alternative. AR001420209. BOEM also quantified the reduction in domestic consumption caused by decreased demand for oil in the no action alternative. AR0014214-15. BOEM further explained that under the no action alternative, foreign demand for oil would also be reduced, but it did not quantify that reduction for reasons that are explained in the record. AR0014220; AR0029965-66. This analysis complied with NEPA. *See Sierra Club I*, 867 F.3d at 202.

II. BOEM Was Not Required to Prepare a Supplemental NEPA Analysis

BOEM was not required to supplement the multiple NEPA analyses that it had already conducted prior to reaching a decision on Lease Sale 257. A supplemental EIS is required only when the agency makes substantial changes to its proposed action or "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1). As the Supreme Court has explained:

> [A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.

Marsh, 490 U.S. at 373. Rather, a "supplemental EIS is only required where new information 'provides a *seriously* different picture of the environmental landscape.'" *Nat'l Comm. for the New River v. Fed. Energy Regulatory Comm'n*, 373 F.3d 1323, 1330 (quoting *City of Olmsted Falls, Ohio v. FAA*, 292 F.3d 261, 274 (D.C. Cir. 2002)); *see also Marsh*, 490 U.S. at 374 (an EIS should be supplemented only if new information shows that the environment will be affected "in a significant manner or to a significant extent not already considered."). An agency's decision not to prepare a supplemental EIS is reviewed under the arbitrary and capricious standard. *Olmsted Falls*, 292 F.3d at 274. "The determination as to whether information is

either new or significant 'requires a high level of technical expertise'; thus, we 'defer to the informed discretion of the [agency].'" *Blue Ridge Envtl. Def. League v. Nuclear Regulatory Comm'n*, 716 F.3d 183, 197 (D.C. Cir. 2013) (quoting *Marsh*, 490 U.S. at 377).

As an initial matter, Plaintiffs suggest that BOEM committed to preparing supplemental EISs prior to each sale and that such a commitment is binding, *see* Pls.' Mem. at 36, but they are mistaken. BOEM stated in the Programmatic EIS that it would conduct "appropriate supplemental NEPA documents," AR000008125, and that such "subsequent NEPA analyses [would] focus on the potential changes in each of the proposed lease sales and on any new issues and information that may have become available since the publication of the previous NEPA document." AR0008202. Nothing in those statements committed the agency to conduct a subsequent NEPA analysis, unless such an analysis would otherwise be required by NEPA. Plaintiffs' reliance on *Western Organization of Resource Councils v. Zinke*, 892 F.3d 1234, 1245 (D.C. Cir. 2018), to suggest otherwise is misplaced. The language they rely on is *dicta* because the court held that any such commitment had been superseded prior to the court's ruling. *Id.* Even if it were not *dicta*, it would not control here because the language in the Multisale EIS did not commit the agency to preparing supplements when doing so would not otherwise be required by NEPA. Therefore, the standard for supplementation established by the Supreme Court and D.C. Circuit law applies.

Based on that standard, BOEM appropriately considered whether such significant new information existed before authorizing Lease Sale 257. In the DNA, BOEM evaluated whether new information was significant and concluded that it was not. Although Plaintiffs point to several studies and reports that have been issued since the preparation of the 2018 Supplemental EIS, they have failed to demonstrate that those studies or reports show that the environmental

impacts of Lease Sale 257 would be significantly different when compared to the analyses that BOEM has already conducted. Therefore, no supplemental analysis was required.[9]

A. Climate Change Information

BOEM was not required to prepare a supplemental NEPA analyses to address new information regarding climate change. Plaintiffs argue that there are a "raft of new reports, studies, and information" about climate change that have been issued since the agency's 2018 Supplemental EIS. *See* Pls.' Mem. at 36. The mere existence of new information, however, does not necessitate a supplemental EIS. *Marsh*, 490 U.S. at 373. Instead, the new information must show a "seriously different picture of the environmental landscape." *Nat'l Comm. for the New River*, 373 F.3d at 1330.

BOEM explained the impacts of climate change and the potential for its 2017-2022 Five-Year Program and lease sales (including Lease Sale 257) to contribute to climate change in the Programmatic EIS, Multisale EIS, and 2018 Supplemental EIS. AR0014377-78-83; *see also* AR0008543-46; AR0015650-51. Consistent with D.C. Circuit law, *see WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013), BOEM used GHG emissions as a proxy for climate change impacts by calculating and disclosing the reasonably foreseeable life-cycle emissions of the entire 2017-2022 Five-Year Program. Significantly, Plaintiffs do not contend that any of the new sources they reference bear in any way on this analysis. They instead argue generically that

[9] In support of their supplementation argument, Plaintiffs rely on several exhibits that are not in the administrative record. *See* Pls.' Exs. 1-29, ECF Nos. 34-10 to 34-39. Such extra-record materials may usually not be considered in an APA case because such cases are decided based on the agency's record. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). Defendants do not object, however, to the Court's considering the exhibits solely for the purpose of determining whether a supplemental NEPA analysis was required. *Cf. Pac. Shores Subdivision, Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 6 (D.D.C. Aug. 10, 2006) (in NEPA cases, a court may consider extra-record materials when necessary to determine whether environmental impacts were adequately analyzed).

BOEM should have reopened its NEPA analysis because there is new information describing the pace and consequences of climate change.

As explained in the DNA, issues relating to climate change, including potential adverse effects of climate change, were analyzed in the Programmatic EIS. AR0029812. Before making a decision to authorize Lease Sale 257, BOEM reviewed the latest research on climate change and concluded that it did not significantly change BOEM's analysis of the potential impacts of the lease sale on climate change. *Id.*; AR0029849-52. Specifically, BOEM reviewed publicly available scientific research, information from relevant government agencies, and scientific journals. AR0029849; AR 0029851-52 (listing references). For example, BOEM reviewed a report by Merrill *et al.* regarding the sequestration of GHG emissions by natural sources and the 2021 Report from the Intergovernmental Panel on Climate Change ("2021 Report"). AR0029850. The 2021 Report concludes, among other things that global warming would reach 1.5°C by the early 2030s, the Arctic could be free of ice by mid- to late century, sea level could rise a meter by 2100, and extreme heat waves could become more intense and more frequent. AR0029850. The 2021 Report also presents five potential scenarios for climate change over the course of the century, and in only two of those—the very low and low emissions scenarios—would global warming remain under 2°C. *Id.* BOEM adequately reviewed these resources and other available scientific literature and reasonably concluded that they did not change its analysis of the potential environmental impacts of its 2017-2022 Five-Year Program, including Lease Sale 257. *Id.*

Plaintiffs' criticisms of BOEM's analysis cannot be reconciled with the DNA and, more broadly, with the administrative record. They argue that BOEM considered only the IPCC

Report and the Merrill study, Pls.' Mem. at 37, but the record shows otherwise.[10] AR0029850-52 (showing consideration of several reports and studies, including reports by the American Meteorology Society and the National Academy of Sciences). They also assert that BOEM simply concluded with no analysis that recent scientific research on climate change did not significantly affect its analysis. In fact, BOEM reviewed the relevant literature and, after considering it, found that it did not significantly affect its analysis. AR0029859. Finally, Plaintiffs contend that BOEM conceded the significance of new climate change information in the ROD, Pls.' Mem. at 37, but that contention is also belied by the record. In fact, the ROD states, "The [2021 IPCC] report as well as additional analysis of climate change *may be* a significant consideration in the Department's decisions regarding oil and gas leasing programs *in the future*." AR0029794 (emphasis added). Moreover, the prior sentence states: "This report does not present sufficient cause to supplement the EIS, at this time." *Id.*

Although Plaintiffs attach numerous reports and studies to their complaint, they fail to demonstrate that the information in those documents rose to the level of significance, such that a supplemental NEPA analysis was required pursuant to 40 C.F.R. § 1502.9(c)(1). The mere existence of additional reports and studies about climate change does not necessitate a supplemental analysis. Instead, it is the Plaintiffs' burden to show that the new information "will affect the quality of the human environment in a significant manner or to extent not considered." *Stand Up for California! v. U.S. Dep' of the Interior*, 994 F.3d 616, 628 (D.C. Cir. 2021) (quoting *Marsh*, 490 U.S. at 374)). Plaintiffs have failed to show that the new information on

[10] Because BOEM explained its position in the record, Plaintiffs' reliance on cases for the proposition that an agency's explanation should be in the record is misplaced. *See*, *e.g.*, *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985).

climate change they present meets that standard, and therefore their claim that a supplemental NEPA analysis of climate change was required should be rejected.[11]

B. Impacts of Drilling in Deepwater

Plaintiffs next assert that new information pertaining to deepwater drilling requires supplementation because BOEM primarily analyzed impacts on shallow water in its NEPA documents. *See* Pls.' Mem. at 17-19, 39. In fact, BOEM analyzed a full range of exploration and production scenarios in the Programmatic EIS. AR0015580-92. These scenarios include exploration and development in shallow water and in deep water. AR0015585; AR 0015589. Further, as BOEM explained in the ROD, the agency is "careful not to underestimate the maximum activity level associated with any particular lease sale." AR0029807. The projected numbers of development and production wells provided in the Programmatic EIS, AR0015583, and DNA, AR0029808 are comparable to the numbers that Plaintiffs provided based on recent well permits available on BOEM's website. Pls.' Mem. at 18. Thus, Plaintiffs are incorrect that the EIS does not adequately analyze the impacts of deepwater drilling, or that supplementation would be required.

Moreover, as explained in the DNA, when a proposed plan of development is submitted, BOEM will conduct an additional NEPA analysis and retains the authority to require additional mitigation to reduce impacts or to disapprove the plan. AR0029809. BOEM's retained authority

[11] Plaintiffs rely on a pair of cases from outside this circuit, neither of which are persuasive here because they involved instances where agencies neglected to analyze significant new information about environmental impacts that had not previously been analyzed at all. *See Friends of the Earth v. Clearwater v. Dombeck*, 222 F.3d 552, 558-59 (9th Cir. 2000) (finding that the agency was required to prepare a supplemental EIS to address potential impacts to seven newly designated sensitive species); *Hughes Rivers Watershed Conservancy v. Glickman*, 81 F.3d 437, 445-46 (4th Cir. 1996) (holding that the agency had failed to sufficiently analyze the potential impacts of Zebra mussel infestation in a proposed reservoir).

to minimize impacts caused by development or to deny a plan in order to avoid such impacts is additional reason why a supplemental analysis at this stage is not required. *Cf. Michigan Gambling Opposition v. Kempthorne,* 525 F.3d 23, 29 (D.C. Cir. 2008) (finding that additional environmental analysis was not necessary where "safeguards in the project sufficiently reduce the impact to a minimum") (quoting *TOMAC v. Norton,* 433 F.3d 852, 861 (D.C. Cir. 2008)).

C. Safety of Oil and Gas Operations

Plaintiffs argue that a supplemental EIS should be prepared to address pipeline safety issues based on a recently issued U.S. Government Accountability Office ("GAO") report. *See* Pls.' Mem. at 21-22, 39-40; *see also* Pls.' Ex. 12, ECF No. 34-21. But the report provides no information that could form the basis of a supplemental analysis. In the report, the GAO recommends that the Bureau of Safety and Environmental Enforcement ("BSEE"), which is responsible for oversight of the safety of offshore operations, should update its regulations regarding the decommissioning of pipelines. *See* ECF No. 34-21 at 2. Although BSEE issued a proposed rule in 2007, *see id.*, it has not yet updated its regulations. Therefore, it is unclear how BOEM could responsibly supplement its analysis to address any potential new regulations. Plaintiffs do not identify new information that would trigger an obligation to supplement.

To the extent Plaintiffs are claiming that BOEM has understated the potential for pipeline failure and resulting oil spills, they are incorrect. The Multisale EIS explained that pipelines can fail due to corrosion, accidents, and weather, and that BOEM commissioned studies following Hurricane Katrina to evaluate the potential failure of offshore pipelines. AR0008401. Further, BOEM acknowledged that offshore pipelines are an ongoing environmental risk and safety hazard. AR0008401-02; *see also* AR0008598-605 (analyzing potential impacts of oil spills); AR0015601-12, 15659-60 (2018 Supplemental EIS). In the DNA, BOEM determined that there

was no new information that would significantly affect the analysis of the potential impacts of oil spills in the prior EISs. AR0029835. That determination is entitled to deference and should be upheld. *See Nat'l Comm. for the New River v. Fed. Energy Reg. Comm'n*, 373 F.3d 1323, 1330 (D.C. Cir. 2004).

D. Impacts on Bryde's Whales

Plaintiffs argue that additional analysis is necessary to address potential impacts to Bryde's whales because a sub-population, the Gulf of Mexico Bryde's whale, was listed as an endangered species under the Endangered Species Act ("ESA") in 2019 and subsequently designated as a distinct species.[12] *See* Pls.' Mem. at 19-21, 41-42; *see also* 84 Fed. Reg. 15,446 (Apr. 15, 2019) (listing the Gulf of Mexico Bryde's whale as endangered); 86 Fed. Reg. 47,022 (Aug. 23, 2021) (making a technical correction to designate the Gulf of Mexico Bryde's whale as a separate species now known as the Rice's whale). These announcements do not necessitate a supplemental analysis because the potential impacts to the whale were adequately analyzed in the prior EISs.

BOEM analyzed the potential impacts of offshore oil and gas development on marine mammals, including the Gulf of Mexico Bryde's whale (Rice's whale), in the Multisale EIS, AR0008778-827, and the 2018 Supplemental EIS, AR0015741-55. Following the listing, the National Marine Fisheries Service ("NMFS") issued a biological opinion, which found that BOEM's offshore oil and gas program would likely jeopardize the continued existence of the Gulf of Mexico Bryde's whale. AR0037445. As explained in the DNA, however, the jeopardy finding was based on the potential for vessel strikes in an area of the Gulf of Mexico that is

[12] Because the underlying EISs and biological opinion used the name to refer to the species at the time, for consistency the term Bryde's whale is used throughout this brief.

currently the subject of a congressional moratorium on leasing, pursuant to the Gulf of Mexico Energy Security Act ("GOMESA"), which lasts through July 2022. AR0029936; *see also* AR0034751 (indicating that on September 8, 2020, the GOMESA moratorium was effectively extended by the President for an additional ten years to 2032). Therefore, no parcels in the areas where the Bryde's whale is known to inhabit will be offered in Lease Sale 257. AR0029936; *see also* AR0029789 (excluding areas not available for leasing under the GOMESA); AR0034754 (showing the Bryde's whale core area in the far eastern part of the planning area).

In addition, Plaintiffs miss the fact that the biological opinion states that if the measures in the reasonable and prudent alternative ("RPA") are adopted, then the proposed action "would not likely jeopardize the continued existence of the Gulf of Mexico Bryde's whale." AR0037491. BOEM accepted the RPA and is implementing the mitigation measures in the RPA through a stipulation (stipulation 4 in BOEM's Final Notice of Sale) which will apply to all leases issued as a result of Lease Sale 257 and through conditions of approval on all post-lease activities requiring a BOEM authorization, permit or plan that may impact the Bryde's whale. AR0029936; *see also* 86 Fed. Reg. at 54,730. In April 2021, NMFS issued an amended incidental take statement ("ITS") reflecting updates and noting that implementation of the RPA removes the jeopardy concern for the Bryde's whale. *Id.*; *see also* AR0034712 (Amended ITS, stating "we determined that the amount or extent of anticipated take is not likely to jeopardize the continued existence of any ESA-listed species or result in the destruction or adverse modification of designated critical habitat, when the [RPA] is implemented"). Therefore, no additional analysis is necessary to evaluate the potential for vessel strikes in the lease sale area.

Moreover, the fact that NMFS made a technical correction to designate the Gulf of Mexico Bryde's whale as a distinct species also does not necessitate a supplemental NEPA

analysis. The sole purpose of the rule was to change the taxonomy and nomenclature applicable to the species. 86 Fed. Reg. at 47,023. The rule expressly states that it "does not change the listing status of the species under the ESA and does not alter any protections afforded the species or any other legal requirements arising from the species' listing under the ESA." 86 Fed. Reg. at 47,023. Given that no new information about potential impacts to the species is set forth in this rule, a simple name change to a species provides no basis for requiring additional NEPA analysis. *See Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 344 (9th Cir. 1996) ("[T]he new listing change the legal status of the salmon, but it did not change the biological status.") (citation and internal quotation marks omitted).

E. Impacts from Fracking Discharges

There is no new information regarding discharges from fracking showing that offshore leasing would have significantly different environmental impacts compared to what was analyzed in the existing EISs. Plaintiffs are incorrect to claim that BOEM did not analyze certain new information regarding the impacts of fracking. Pls.' Mem. at 23-24, 42. Discharges from fracking, or any other operation, must be in compliance with a National Pollutant Discharge Elimination System ("NPDES") permit approved by the U.S. Environmental Protection Agency ("EPA"). AR0029831. BOEM conducted research to determine whether any significant new information regarding pollutant discharges existed and determined that this topic was adequately analyzed in the Multisale EIS and 2018 Supplemental EIS. AR0029831; AR0029836; *see also* AR0008325-43, 8404-05 (Multisale EIS); AR0015594-602, 15610-12.

In support of their arguments that supplemental analysis of fracking impacts was required, Plaintiff cite a report issued by the Center for Biological Diversity ("CBD"), one of the Plaintiffs in this case, entitled, "Toxic Waters, How Offshore Fracking Pollutes the Gulf of

Mexico." *See* Pls.' Ex. 22, ECF No. 34-31. But while the report contains the CBD's policy recommendations for offshore fracking, Plaintiffs fail to demonstrate that it contains any information that was not already considered by BOEM when it made its leasing decision.

F. Impacts on Offshore Wind Development

Finally, Plaintiffs claim that BOEM was required to conduct additional analysis of potential impacts on wind energy development. *See* Pls.' Mem. at 23-24, 42-43. The potential impacts on wind energy development on the OCS is analyzed in the Multisale EIS, AR0008452-54, and the 2018 Supplemental EIS, AR0015616-22. In the DNA, BOEM explained that BOEM published two studies analyzing the feasibility of wind energy facilities in the Gulf of Mexico and has published a request for interest in potential renewable energy in the gulf. AR0029846. Further, BOEM stated, "If any such projects are approved in the future, there is no reason to believe that renewable and conventional energy could not continue in the [Gulf of Mexico] without conflict and therefore the conclusions from the 2018 SEIS remain accurate." *Id.* Plaintiffs offer no information that would suggest that wind energy facilities could not coexist with oil and gas operations in the Gulf.

CONCLUSION

In sum, Plaintiffs have failed to demonstrate that BOEM violated NEPA in reaching its decision regarding Lease Sale 257. BOEM conducted an appropriate analysis of GHG emissions, and no supplemental NEPA analysis is required to address climate change or the other topics identify by the Plaintiffs. If the Court, nevertheless, finds that a NEPA violation occurred, the government requests that the Court allow further briefing on the appropriate remedy.

Respectfully submitted this 10th day of November, 2021,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 2021, I filed the above pleading with the Court's CM/ECF system, which provided notice of this filing by e-mail to all counsel of record.

/s/ *Luther L. Hajek*
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